RECORD AND BRIEFS

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IN THE

Supreme Court of the United States

ENDREW F., A MINOR, BY AND THROUGH HIS PARENTS AND NEXT FRIENDS, JOSEPH F. AND JENNIFER F.,

Petitioner,

v.

DOUGLAS COUNTY SCHOOL DISTRICT RE-1,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF OF *AMICI CURIAE* NATIONAL CENTER FOR SPECIAL EDUCATION IN CHARTER SCHOOLS AND NATIONAL ALLIANCE FOR PUBLIC CHARTER SCHOOLS IN SUPPORT OF PETITIONER

LISA T. SCRUGGS
ERICA FRUITERMAN
DUANE MORRIS LLP
190 South LaSalle Street
Suite 3700
Chicago, IL 60603-3433
(312) 499-6742
LTScruggs@duanemorris.com

WILLIAM P. BETHKE
Counsel of Record
KUTZ & BETHKE LLC
363 S. Harlan Street
Suite 104
Lakewood, CO 80226
(303) 922-2003
wpbethke@lawkb.com

Counsel for Amici Curiae

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OTHER AUTHORITIES

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Center for Research on Educational Outcomes (CREDO), URBAN CHARTER SCHOOL STUDY REPORT ON 41 REGIONS (2015)..... 5, 6

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Lauren M. Rhim, Dana Brinson, & Joanne Jacobs, CASE STUDIES OF CHARTER INNOVATION AND SUCCESS (2010)..... 5

Lauren M. Rhim, Jessie J. Gumz, & Kelly Henderson, *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012* (2015) 2, 5

TABLE OF AUTHORITIES—Continued

Page(s)

Meagan Batdorff, Larry Maloney, Jay F. May, Sheree T. Speakman, Patrick J. Wolf, Albert Cheng, CHARTER SCHOOL FUNDING: INEQUALITY EXPANDS (2014), ... 10

National Alliance for Public Charter Schools, *A Model Law for Supporting the Growth of High Quality Public Charter Schools*: Second Ed (2016) 12

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae, National Center for Special Education in Charter Schools ("NCSECS") and National Alliance for Public Charter Schools ("NAPCS") are national nonprofit organizations committed to ensuring that students with disabilities have equal access to public charter schools and that charter schools operate so that all students may succeed. NCSECS and NAPCS support the Petitioner's position that the Tenth Circuit decision should be reversed. *Amici* submit this brief because we find adoption of a higher standard is the most consistent with the charter school movement's emphasis on high expectations for all students and its commitment to serving students with disabilities enrolled in charter schools. NCSECS and NAPCS *Amici* also believe the experience of charter schools, reflected in research, sheds light on the issue before the Court.

Amicus curiae NCSECS is dedicated to ensuring that students with disabilities have equal access to public charter schools and that such schools are designed and operated to enable all students to succeed. NCSECS is based in New York City and was founded in 2013 by long-time special education and school reform advocates, Lauren Morando Rhim and Paul O'Neill.

NCSECS is the first organization to focus solely on working with states, charter authorizers, special

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[1] Pursuant to SUP. CT. R. 37.3(a), *Amici* certify that both parties have consented to the filing of this amicus brief. Pursuant to SUP. CT. R. 37.6, *Amici* certify that no counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution to fund its preparation or submission, and no person other than *Amici* or their counsel made such a monetary contribution.

education advocates, and charter school organizations to improve access and create dynamic learning opportunities for students with disabilities in charter schools. Despite the rapid growth of charter schools—the first charter school opened its doors in 1992 and enrollment now exceeds 2.5 million students in over 6,700 charter schools across the U.S.—criticism persists about equal access and robust services for the roughly 250,000 students with disabilities in charter schools.[2] In order to ensure that more students with learning differences succeed in charter schools, NCSECS conducts research; develops policy papers; brings the special education and charter school communities together; informs federal and state education policy; and undertakes targeted fieldwork.

Amicus Curiae NAPCS is the leading national organization committed to advancing the public charter school movement. NAPCS endeavors to increase the availability of high-quality charter schools as options for families, especially those families without access to high-quality traditional public education. NAPCS has developed model charter school legislation that has influenced statutes and regulations in many states, and supports research, publications, and advocacy furthering the charter school movement.

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[2] Lauren M. Rhim, Jessie J. Gumz, & Kelly Henderson, *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012*. National Center for Special Education in Charter Schools (2015), (accessed 11/6/2016); https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/567b0a3640667a31534e9152/1450904118101/crdc_full.pdf (accessed 11/6/2016).

SUMMARY OF ARGUMENT

Amici support reversal of the Tenth Circuit's decision here. The standard used by the Tenth Circuit is not aligned with the goal many charter schools have of setting high expectations and serving *all* students, including those with special needs. The charter school experience illustrates that use of the Tenth Circuit standard is not necessary to avoid undue costs. A more demanding standard can instead stimulate greater coordination amongst educational institutions and innovation.

Importantly, there is no evidence to suggest that the meaningful educational benefit standard used by the Third Circuit has resulted in undue costs for the states or that application of a "higher" standard will result in a greater number of IDEA disputes. Through its decision in *Board of Education of Hendrick Hudson School District v. Rowley*, 458 U.S. 176 (1982), ("*Rowley*"), this Court has given states needed tools for containing special education costs. Yet the "just-more-than-trivial-benefit" standard creates an adversarial context that may very well increase certain costs.

The Court should also reject Respondent's request to adopt the barely more than *de minimis* standard because it cannot be squared with a proper interpretation of the *Rowley* standard and its reading of a free appropriate public education ("FAPE").[3] This sanctions a vision of extraordinarily low expectations for students with disabilities and in that regard is

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[3] *See* 20 U.S.C. §§ 1401(9) (definition of FAPE), 1414(a)(1)(A) (state obligation), 1413(a)(1) (local educational agency obligation to meet state obligations).

wholly inconsistent with a fair reading of the Individuals with Disabilities Education Act ("IDEA").[4]

For these reasons, the Court should reverse the Tenth Circuit decision and adopt a more robust standard.

ARGUMENT

I. CHARTER SCHOOLS EXPERIENCE DOES NOT SUPPORT ADOPTING THE JUST-MORE-THAN-TRIVIAL-BENEFIT STANDARD.

The development of public school choice laws and charter schools as public schools of choice has been widespread over the last few decades.[5] Throughout the country, public charter schools welcome students with disabilities and provide them with opportunities to reach their educational goals. In states where charter schools operate as part of a public school choice system, families can extend their school options beyond a single, geographically-zoned public school and choose a school from among a variety of schools with different approaches to education. In these communities, parents of students with disabilities can select among a range of educational methodologies—Core Knowledge, Montessori, Direct Instruction, Expeditionary Learning, "No Excuses" education, Multiple Intelligences approaches, and many others—to find a school that will advance their child's educational progress.

Charters may attract students with disabilities due to the school's curricular focus, educational program

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[4] 20 U.S.C. §§ 1401-1487.

[5] Forty-three states and the District of Columbia now have charter school laws. *See*, e.g., http://dashboard.publiccharters.org/Home/?p=Home#state (accessed 10/21/2016).

or a structure believed to benefit certain students (often those with mild/moderate disabilities). Other charters implement a whole-school design that is aimed at effectively addressing the specific needs students with disabilities have. In addition, other innovative charter schools specifically develop special education programs designed for students with more significant, even severe-to-profound, disabilities.[6] Regardless of type, by meeting the needs of students with disabilities through the school design itself, many public charter schools can reduce the need for specialized interventions and supports. When run well, these schools can provide high quality *special* education options.[7]

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[6] *See* Lauren M. Rhim, Jessie J. Gumz, & Kelly Henderson, *Key Trends in Special Education in Charter Schools: A Secondary Analysis of the Civil Rights Data Collection 2011-2012*. (2015), https://static1.squarespace.com/static/52feb326e4b069fc72abb0c8/t/567b0a3640667a31534e9152/1450904118101/crdc_full.pdf (accessed 11/6/2016); Lauren M. Rhim, Dana Brinson, & Joanne Jacobs, *Case Studies of Charter Innovation and Success* in Robin Lake, ed., UNIQUE SCHOOLS SERVING UNIQUE STUDENTS: CHARTER SCHOOLS AND CHILDREN WITH SPECIAL NEEDS (2010).

[7] A Massachusetts Institute of Technology study found students with disabilities in Boston charter schools to be outperforming comparable students in traditional public schools. Elizabeth Setren, SPECIAL EDUCATION AND ENGLISH LANGUAGE LEARNER STUDENTS IN BOSTON CHARTER SCHOOLS: IMPACT AND CLASSIFICATION (2015) ("Charter attendance boosts achievement similarly for special needs and non-special needs students. Charters also increase the likelihood that special needs students meet high school graduation requirements and earn a state merit scholarship. Even the most disadvantaged special needs students benefit from charter attendance.") (abstract), https://seii.mit.edu/research/study/special-education-and-english-language-learner-students-in-boston-charter-schools-impact-and-classification/ (accessed 10/23/2016). *See also* Center for Research on Educational Outcomes – Stanford University, URBAN CHARTER SCHOOL

Charter schools are founded upon the belief that individual schools should be able to design and deliver a program of instruction that sets high expectations for all of the students it serves and then be held accountable to meet those expectations. As a result, the majority of charter schools embrace an internal ethic (if not a formal commitment to the authorizer that approved their charter) of high expectations for all students. This public charter school ethic and commitment to meet the needs of all students is congruent with a more robust standard. Thus, adoption of the Third Circuit standard is entirely consistent with the charter school practice of giving due consideration to parental choice and working to meet the educational goals for all students.

The "just-more-than-trivial" standard pushed by Respondent, by contrast, is inconsistent with these charter school pillars. Consistent application of Petitioner's proposed standard will benefit students with disabilities in public charter schools for several reasons.

First, as noted above, the standard for FAPE should be aligned with the high expectations embraced as

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STUDY – REPORT ON 41 REGIONS (2015), at 17 ("Black and Hispanic students, students in poverty, English language learners, and students receiving special education services all see stronger growth in urban charters than their matched peers in urban TPS [traditional public schools]."), https://urbancharters.stanford.edu/download/Urban%20Charter%20School%20Study%20Report%20on%2041%20Regions.pdf (accessed 10/31/2016). We hasten to add that new and small charter schools often struggle with the demands of special education—and will likely continue to do so under any standard. Charter schools and school choice are not a panacea. They are policies that can be—and in a significant number of instances have been—articulated to good effect in this field.

foundational by the vast majority of charter schools. A clear standard from this Court will be applied consistently across all of the states in which charter school operate. And such a standard will facilitate the ability of charter schools to maintain a consistent commitment to setting high expectations for all students. Rather than choosing when to hold high expectations for children, all charter schools, like all other public schools, will consistently seek to do so, for all students.

Second, the capacity many charter schools have to best serve their students with disabilities will be enhanced under a standard reflecting higher expectations. In many states charter schools are part of a larger local education agency ("LEA") or school district.[8] The LEA bears the legal responsibility, and in most cases practical responsibility, for compliance with IDEA.[9] For those charter schools that must provide special education to their students based upon the services and/or financial support they receive from the LEA, a higher standard will enable charter schools to call upon the LEA for support.

Third, for those charter schools that serve as their own LEAs or that otherwise assume the responsibility of providing special education under IDEA, a standard reflecting high expectations should enhance existing incentives for charter schools to further innovate in order to best serve students with disabilities. Charter

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[8] *See* 20 U.S.C. § 1401(19)(A) (definition of LEA); C.R.S. § 22-20-103(1) (defining the "administrative unit[s]" responsible for providing special education).

[9] *See* n. 2, above. *See also* 20 U.S.C. § 1413(a)(5) (requiring comparability of service and funding for charter schools within an existing LEA).

schools will be motivated to share resources and spread the costs of serving their students while adhering to IDEA.

Finally, adoption of such a standard will likely prompt school leaders and parents to utilize all available resources to meet students' needs, including access to public charter schools whose educational focus or design may facilitate IDEA compliance. Charter schools can expand the tools a school district has available to fulfill a child's special education needs and reduce the cost and risk of unilateral placement. In so doing, and combined with a clear, more robust standard, placement in charter schools can increase the likelihood that appropriate individual education program ("IEP") goals are set and met, and reduce the likelihood that parents will resort to "due process."[10] The experience of charter schools supports the enhanced expectations expressed in the Third Circuit standard.

II. THE JUST-MORE-THAN-TRIVIAL-BENEFIT STANDARD SHOULD NOT BE ADOPTED BASED UPON CONCERNS WITH UNDUE FINANCIAL BURDEN OR INCREASED LIKELIHOOD OF LITIGATION.

In no case should cost serve as a basis for a school's failure to provide FAPE.[11] Yet, we also acknowledge

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[10] *See* Albert O. Hirschman, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970) (comparing mechanisms of "exit"—such as school choice—with those of "voice"—such as "due process" and litigation).

[11] *Florence Cty. Sch. Dist. Four v. Carter by and through Carter*, 510 U.S. 7, 15 (1993) ("There is no doubt that Congress has imposed a significant financial burden on States and school districts that participate in IDEA. Yet public educational authorities who want to avoid reimbursing parents for the private education of a disabled child can do one of two things: give the

that a small number of students in special education require very costly services—under any standard this Court adopts. As charter schools are frequently smaller and sometimes newly founded educational institutions, sudden and extraordinary special education costs can present a financial challenge. However, while individual cases may pose challenges, there is no reason to believe that adoption of the just-more-than-trivial-benefit standard will bring decreased costs overall or lower rates of litigation. Such notions are not supported by available data or thoughtful analysis.

A. Application Of The Just-More-Than-Trivial-Benefit Standard Does Not Correlate With Decreased Education Spending.

State education spending data suggests that application of a higher standard does not drive overall increases in spending. Use of the just-more-than-trivial-benefit standard does not necessarily result in lower spending either. Any argument that implementation of a higher standard of educational benefit will dramatically increase costs incorrectly assumes that the failure to reach that standard invariably turns on the dollar amount spent to provide education. Instead, providing meaningful educational benefit may involve successful resolution of disputes over a student's educational needs, result in better use of existing

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child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice. This is IDEA's mandate. . . .")

resources and spur innovation and employment of a greater variety of approaches to instruction.[12]

Charter schools offer strong evidence that innovation can lead to improved outcomes without unduly increasing cost. Charter schools, on average, operate with about 80% of the funding of traditional public schools.[13] Many of these schools have improved education for the children they serve through use of different educational approaches and without cost serving as the driving force.

In Chart 1, *Amici* compares a cross-section of states from two circuits on each side of the interpretive split at issue in this case. Looking at 2012 education spending data for those states in the Third and Sixth Circuits that operate under the meaningful benefit standard, we see that results are distributed rather evenly across the first, second, third, fourth and fifth quintile of spending on public education. In fact, only

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[12] *See United States v. Virginia*, 518 U.S. 515, 542 (1996) ("Education, to be sure, is not a 'one size fits all' business.").

[13] *See* Meagan Batdorff, Larry Maloney, Jay F. May, Sheree T. Speakman, Patrick J. Wolf, Albert Cheng, CHARTER SCHOOL FUNDING: INEQUALITY EXPANDS (2014), http://www.uaedreform.org/wp-content/uploads/charter-funding-inequity-expands.pdf (accessed 10/23/2016). Journalists and advocates often point to charter school access to private philanthropy as mitigating or overcoming gaps in tax-based funding. The study cited here found a persistent roughly-20% gap in funding from all sources, *including* philanthropic. *Id.*at p. 9 ("Findings for FY11 debunk the myth that charter schools received disproportionate funding from non-public sources, such as philanthropy. . . . Districts recorded more per pupil funding from other non-public sources than did charter schools, $571 to $552 per pupil, respectively.").

one of seven states subject to meaningful benefit standard appeared in the top quintile.[14]

At the same time, education spending data from the Second and Tenth Circuit states, where the just-more-than-trivial-benefit standard is applied, shows that four of the states sit in the *top* quintile for K-12 public education spending. The education funding levels for the remaining five states are spread over the third, fourth and fifth quintile. This data shows that application of the meaningful benefit standard does not correlate with higher education spending. If use of the meaningful benefit standard adds any overall education costs, that effect is small enough to be masked by other factors and is virtually invisible at the level of state per pupil expenditures. Indeed, on its face, the data suggests that the opposite is true; multiple states using the just-more-than-trivial-benefit standard appear to have *higher* spending. However, a more credible conclusion is that special education costs do not drive overall education spending patterns. Instead, they likely reflect significant

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[14] Appendix, Chart A shows state per pupil expenditures in 2012, ranked top to bottom, by quintile, for the seven Third and Sixth Circuit ("meaningful benefit") states and the nine Second and Tenth Circuit ("just-more-than-trivial" benefit) states. States in other circuits are listed by quintile following the chart. Direct data on special education expenditures are, unfortunately, badly dated. *See* Thomas Parrish, Jenifer Harr, Jean Wolman, Jennifer Anthony, Amy Merickel, and Phil Esra, *State Special Education Finance Systems, 1999-2000: Part II: Special Education Revenues and Expenditures* (2004), http://www.csef-air.org/publications/csef/state/statepart2.pdf (accessed 10/31/2016). For a host of reasons, some noted by Parrish, et al., and including changes in spending patterns after 2008, this 1999-2000 data has almost no utility.

regional variations and unique state circumstances that have nothing to do with special education.

Like other educational bodies, particularly small rural school districts, a standard that brings higher expectations may require charter schools to develop new approaches to serving students with disabilities. But charter school policy is also relatively new and, with respect to special education, underdeveloped. Thus, we anticipate the attention given to this Court's decision will create opportunities to encourage state-level policy changes where needed, and increase the use of organizational flexibility and partnerships already permitted under IDEA.[15] Tools to assist the states with this task are available.[16]

B. The Just-More-Than-Trivial-Benefit Standard Is Not Correlated With Lower Risk of Litigation.

The application of the meaningful benefit standard has not correlated with increased litigation. Indeed, available evidence on the rate of IDEA disputes in different jurisdictions does not suggest a relationship with either of the standards for judging FAPE.[17] As

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[15] *See*, e.g., 20 U.S.C. 1411(e)(3) (creation of local risk pools authorized); 1413(e)(4) (authorization for educational services agencies to assume certain LEA obligations).

[16] *Amicus Curiae* NAPCS has developed and refined provisions of its "model law" intended to provide state policy-making bodies with paths for coordinating charter school policy with IDEA obligations. NAPCS, A MODEL LAW FOR SUPPORTING THE GROWTH OF HIGH QUALITY PUBLIC CHARTER SCHOOLS: SECOND EDITION (2016), http://www.publiccharters.org/wp-content/uploads/2016/10/2016ModelCharterSchoolLaw.pdf (accessed 10/27/2016), at pp. 63-66.

[17] Appendix, Chart B (comparing the same circuits examined in relation to cost in n.22 and Chart A for the rate of IDEA filings

with cost, jurisdictions on each side of the doctrinal divide include those with the highest and fewest number of disputes.

While there are certainly cases (and this is likely one) in which the parents' unilateral placement is more expensive than the District's proposed alternative, a case that is not resolved at the IEP meeting, not resolved in administrative "due process," not resolved at trial, not resolved in the circuit court of appeals, and makes its way to this Court is more likely to be an outlier than an exemplar.[18] Indeed, this case only reaches this Court because a split has developed and hardened, 34 years after the decision in *Rowley*, on an issue of law.

But if this Court resolves this matter with a clear restatement of the *Rowley* standard for educational benefit, it is not at all obvious that either of the proposed alternatives entails an inherently greater average cost, a greater range of issues, or some other potential for excessive cost or needless dispute in the run of future cases. Such consequences are unlikely, not least because the level-of-benefit question was never the primary aspect of *Rowley* giving states a reasonable ability to police the cost of special education and the disputatiousness of special education issues.

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per 10,000 students, by rank order). As with cost, this data reflects differences in standards for FAPE poorly or not-at-all.

[18] There is an additional constraint on cost associated with even this case. The parents here, if ultimately successful, are not entitled to be reimbursed what they have spent, but to recovery limited to the "reasonable" cost of the services secured to provide FAPE. *Florence Cty.*, 510 U.S. at 16.

Rowley offered two general cautions to lower courts that bear on cost and dispute resolution.[19] First, *Rowley* instructs that administrative "due process" decisions be given "due weight."[20] When dealing with a split in the circuits, the resulting issue of law defeats the dispute resolution function of giving weight to a trier of fact's findings. Once this Court resolves that split, it is likely that the vast majority of decisions on whether a student has received "meaningful" benefit (for example) will once again revert to being fact-driven and, if disputed, most often resolved at the lowest level.

The very lowest level of the IDEA process, of course, is the IEP meeting. And at IEP meetings the just-more-than-trivial-benefit standard has a perverse effect from both a cost and dispute resolution standpoint. This standard structures a conversation in which public officials trying to work through a difficult IEP are continuously tempted to inform parents about how little the school system is obligated to do for a child. This can be an accurate and even sympathetic restatement of applicable law, but it invariably sets parents' teeth on edge. The meaningful benefit standard more clearly invites, in contrast, a positive discussion of what the school and parents together can do to support a child's education. Neither standard is proof against disputes. But a legal frame of just-above-trivial benefit immediately risks an adversarial conversation. The meaningful benefit standard encourages a more collaborative framework. Given the millions of IEP meetings held every year, consistently

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[19] *See* III(A), below.

[20] *Rowley,* 458 U.S. at 206.

framing discussions in the collaborative terms anticipated by IDEA[21] should reduce and mitigate disputes with resulting avoidance of some costs.

Second, *Rowley* emphasized that courts were not to be in the business of prescribing state educational policy.[22] This concept tips the scales in favor of school authorities whenever they are carrying out reasonable State educational policies in ways otherwise consistent with IDEA. Again, given the split in the circuits at issue here, issues of state policy, if any, have no bearing: the issue is defining FAPE. Once this Court has spoken the field will presumably return to discussion of a unitary standard, with state educational policy coming into play when it is already clear IDEA has been followed.

Given these controls, the Court should not assume that higher overall cost or likelihood of litigation are strongly correlated with either standard argued in this case.

III. THE TENTH CIRCUIT STANDARD FOR FAPE IS INCONSISTENT WITH *ROWLEY*.

The "just-above-trivial" standard, does not correctly interpret *Rowley* and IDEA. Eight years after adoption of IDEA, this Court in Rowley took up its first IDEA case. Among other things Rowley addressed the degree of educational benefit required for students in special education to meet a core requirement of IDEA: the provision of a free appropriate public education. Different interpretations are also reflected in a split in certain

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[21] *See*, e.g., *Rowley*, 458 U.S. at 208-209.

[22] *Rowley*, 458 U.S. at 207-208.

federal courts of appeals—with variations, confusion or inconsistency in other circuits.

This brief is limited to the narrow argument that reversal of the Tenth Circuit decision is warranted. Thus, we will not duplicate the discussion in other briefs of all sources of reinforcement for that conclusion nor of possible further refinement or enhancement of the appropriate standard. *Amici* will here compare those circuits (notably the Third[23]) that have required a meaningful educational benefit (the meaningful benefit standard) and that have a more accurate fix on the meaning of *Rowley* with those circuits (here, the Tenth[24]) that only require educational progress that is just "more than *de minimis*" (the "just-more-than-trivial-benefit standard"). Looking narrowly at that comparison, it is clear that the just-more-than-trivial-benefit standard cannot be squared with *Rowley* itself.

A. Rowley.

The *Rowley* Court reviewed the first grade schooling of Amy Rowley, a student with a hearing impairment. The school district had provided Amy with substantial interventions (focused, in part, on an amplification system). Amy had passed first grade with above-average marks within the conventional grading system. Amy's parents sought the provision of a sign language interpreter for their daughter, contending that this would

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[23] *See Ridgewood Board of Education v. N.E.*, 172 F.3d 238, 247 (3rd Cir. 1999) ("significant learning and meaningful benefit . . . gauged in relation to a child's potential").

[24] *See Thompson R20J Sch. Dist. v. Luke P. ex rel Jeff P.*, 540 F.3d 1143, 1149 (10th Cir. 2008)("merely * * * 'more than *de minimis*'" benefit sufficient)(quoting *Urban ex rel Urban v. Jefferson Cty. Sch. Dist. R-1*, 89 F.3d 720. 727 (10th Cir. 1996)).

allow her to more fully realize her academic potential. The Court rejected the suggestion that every student achieving his or her full potential was a credible interpretation of FAPE.[25] It likewise found the concepts of literal "equality" in education and achieving self-sufficiency unhelpful.[26] The Court observed that both "equal" education and achieving self-sufficiency were likely to be too demanding a standard for some students with disabilities and too little for others.[27] Noting the long history of bitter debates in deaf education,[28] the Court declined to become enmeshed in pedagogical issues and found that the substantial interventions tailored to Amy's needs combined with Amy's above-average progress by general education standards constituted offering a free appropriate public education, or FAPE.

Although in *Rowley* the Court carefully "confine[d]" the analysis to a student "receiving substantial specialized instruction and related services . . . who is performing above average in the regular classrooms of

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[25] *Id.*, 458 U.S. at 199 (realization of the full potential of every child with a disability "further than Congress intended to go").

[26] *Rowley*, 458 U.S. at 198-201 & n.23.

[27] *Id.*, 458 U.S. at 198-99, 201 n.23.

[28] *See*, e.g., Oliver Sacks, SEEING VOICES: A JOURNEY INTO THE WORLD OF THE DEAF (1990); Harlan Lane, WHEN THE MIND HEARS: A HISTORY OF THE DEAF (1988) (each recounting over a century of controversy in deaf education). We note that since 1982 advocates of robust use of sign language in deaf education have become critical of interpretation—advocated by the Rowleys as a form of access to sign language—as an instructional methodology. *See*, e.g., Elizabeth A. Winston, *An Interpreted Education: Inclusion or Exclusion?* in Robert Clover Johnson and Oscar P. Cohen, IMPLICATIONS AND COMPLICATIONS FOR DEAF STUDENTS OF THE FULL INCLUSION MOVEMENT, Gallaudet Research Institute Occasional Paper 94-2 (1994).

a public school system,"[29] the *Rowley* discussion has nonetheless been the touchstone for analysis of FAPE in a broad range of cases since 1982. The Court stated the core of its holding this way: "if the child is being educated in regular" education the IEP[30] should be calculated to "enable the child to achieve passing marks and advance from grade to grade."[31] In the course of discussing this holding the Court referred to both "meaningful" and "some" educational progress, giving rise to much discussion in the certiorari papers here.[32] But the Court's conclusion is not stated in these precise terms and is tolerably clear: for Amy Rowley FAPE was provided because she received substantial specialized services and her first grade education was a success. The ultimate outcome of "achiev[ing] passing marks and advanc[ing] from grade to grade" is, after all, intended to be graduation from high school with appropriate preparation for later life. And a student who graduates with the equivalent of traditional As, Bs and Cs—particularly one whose performance can be characterized as "above average"—can reasonably be regarded by objective observers as successful.

B. Applying *Rowley* To A Broad Range of Students.

Extending this analysis to address students whose progress is not well measured through the use of traditional marks, one could restate this part of the holding as requiring a plan anticipating educational progress

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[29] *Rowley*, 458 U.S. at 202.

[30] *See* 20 U.S.C. § 1414(d)(1)(A).

[31] *Rowley*, 458 U.S. at 204.

[32] *Compare Rowley*, 458 U.S. at 192 ("meaningful") *with Id.* at 200 ("some").

that, if achieved, would be regarded as successful advancement of that student, through that portion of their public school career. While this involves making some form of reference to expectations for the student that is, of course, exactly what is done in general education, exactly what the Court did in *Rowley*, and a necessary element of writing an always-future-oriented IEP. Further, *Rowley* rejected both sameness and self-sufficiency as standards because these would define expectations too high for some children *and too low for many others*. This observation—that certain demonstrable achievements could be "too low"—cannot be squared with a just-more-than-trivial-benefit standard. Finally, the Court underscored this very point by qualifying its own holding and cautioning that, for some students, even routinely advancing from grade to grade was not to be taken as "automatically" enough to satisfy FAPE.[33]

Rowley is all-but-synonymous with requiring meaningful educational progress as described by the Third Circuit. More important, *Rowley* is plainly incompatible with requiring just-more-than-trivial progress. To revert to reference to traditional marks, a "D" as opposed to an "F" or a "zero" signifies more than "trivial" progress. Indeed, an "F+"—were such a grade awarded—would signify something non-trivial. After all "+" and "-" are intended to convey a non-trivial message. But one cannot read *Rowley* and believe that a mix of Fs and Ds would have resulted in a ruling that Amy Rowley had enjoyed a free and appropriate public education. The Court's further caution that passing from grade to grade was quite significant but not a guarantor of FAPE makes this point with something approaching

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[33] *Rowley*, 458 U.S. at 203 n. 25.

certainty: real progress, meaningful progress, a plan for education that could be reasonably viewed as successful—not optimal, not the same as everyone else's, but also not just-barely visible—is required.

On this point, an exchange in the certiorari papers here is telling. The Solicitor General proposed that the just-more-than-trivial-benefit standard could be met by providing necessary sensory access for a student with a hearing impairment in a single class, but denying the same service in other classes, precluding virtually all progress in those subjects.[34] This, clearly, would allow more-than-trivial progress (passing one class) yet be absurd—reflecting a practice we believe no district or school would even attempt. The Respondent's retort was that this *reductio ad absurdum* was incorrect because the Americans with Disabilities Act[35] ("ADA") would be violated by such a practice.[36] But the issue here is not whether the ADA—adopted 15 years after IDEA and eight years after *Rowley*—would preclude a ludicrous result, or even if anyone would propose or agree to such an IEP. The issue is whether the core concept of FAPE embedded in IDEA has *internal* integrity or is itself reduced to absurdity by the just-more-than-trivial-benefit standard. That the sophisticated Respondents here resorted to extrinsic sources illustrates that the just-more-than-trivial-benefit standard—unassisted by an ADA-based *deus*

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[34] *Endrew F. v. Douglas County Sch. Dist.*, Brief of the United States as Amicus Curiae at 14-15.

[35] 42 U.S.C. §§ 12101 – 12213.

[36] *Endrew F. v. Douglas County Sch. Dist.*, Supplemental Brief for Respondent at 11.

ex machina—defines FAPE in a manner that lacks internal integrity and is inconsistent with *Rowley*.

C. The Just-More-Than-Trivial-Benefit Standard Is Inconsistent with IDEA.

As this Court recently observed, "in every case we must respect the role of the Legislature, and take care not to undo what it has done. A fair reading of legislation demands a fair understanding of the legislative plan."[37] As *Rowley* recognized, IDEA was an ambitious effort to address the educational needs of students unjustifiably excluded from public education.[38] That fundamental purpose is not addressed by just-more-than-trivial progress. Just as this standard is inconsistent with *Rowley*, it is inconsistent with the IEP process itself. Requirements for an IEP include (among other things):

> (II) A statement of measurable annual goals, including academic and functional goals designed to—
>
> (aa) Meet the child's needs that result from the child's disability to enable the child to be involved in and make progress in the general education curriculum; and. . . .
>
> * * *
>
> (IV) A statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications

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[37] *King v. Burwell*, 576 U.S. __, ___ (2015), Slip Op. at 21.

[38] *Rowley*, 458 U.S. at 200-204.

> or supports for school personnel that will be provided to enable the child—
>
> (aa) To advance appropriately toward attaining the annual goals;
>
> (bb) To be involved in and make progress in the general education curriculum in accordance with paragraph (a)(1) of this section, and to participate in extracurricular and other nonacademic activities; and
>
> (cc) To be educated and participate with other children with disabilities and nondisabled children in the activities described in this section . . ..[39]

Though these are technically descriptions of process rather than substance, the implications of these details (and others) are palpable and inconsistent with a legislative plan to seek just-more-than-trivial progress. The legislative plan for FAPE as a cornerstone of IDEA was, as this Court plainly recognized in *Rowley,* an expectation that students with disabilities would receive a real education. That expectation is not respected by the just-more-than-trivial-benefit standard.

CONCLUSION

The just-more-than-trivial-benefit standard does not keep faith with *Rowley* or IDEA. Consistent application of a standard reflecting higher expectations will inure to the benefit of students with disabilities in all public charter schools. Moreover, there is no support for the notion that efforts to meet such a standard will radically increase education costs or rates of IDEA

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[39] 20 U.S.C. § 1414(d)(1)(A)(i).

litigation. Rejecting the just-more-than-trivial-benefit standard is consistent with IDEA itself, one of the single most successful school reform efforts in American history.

Respectfully submitted,

LISA T. SCRUGGS
ERICA FRUITERMAN
DUANE MORRIS LLP
190 South LaSalle Street
Suite 3700
Chicago, IL 60603-3433
(312) 499-6742
LTScruggs@duanemorris.com

WILLIAM P. BETHKE
Counsel of Record
KUTZ & BETHKE LLC
363 S. Harlan Street
Suite 104
Lakewood, CO 80226
(303) 922-2003
wpbethke@lawkb.com

Counsel for Amici Curiae

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APPENDIX

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CHART A: STATE PER PUPIL EXPENDITURES	Just More than Trivial Benefit	Meaningful Benefit
First Quintile	New York (2nd Cir.): $20,610; Connecticut (2nd Cir.): $17.745; Vermont (2nd Cir.): $16,988; Wyoming: $15,797 (10th Cir.).	New Jersey: $17,907 (3rd Cir.).
Second Quintile		Pennsylvania: $13,961 (3rd Cir.); Delaware: $13,938 (3rd Cir.); Ohio: $11,354 (6th Cir.).
Third Quintile	Kansas: $9,972 (10th Cir.).	Michigan: $11,110 (6th Cir).
Fourth Quintile	New Mexico: $9.734 (10th Cir.); Colorado: $8985 (10th Cir.).	Kentucky: $9.312 (6th Cir.).
Fifth Quintile	Oklahoma: $7,729 (10th Cir.); Utah: $6,500 (10th Cir.).	Tennessee: $8630 (6th Cir.).

First quintile: District of Columbia: $18,485; Alaska: $18,416; Massachusetts: $15,087; Rhode Island: $14,767; New Hampshire: $14,335.

Second quintile: Maryland: $14,003; Illinois: $13,077; Maine: $12,707; Hawaii: $12,458; North Dakota: $12,358; Nebraska: $11,726; Minnesota: $11,464.

Third quintile: West Virginia: $11,260; Wisconsin: $11,186; Montana: $11,017; Virginia: $10,973; Louisiana: $10,749; Iowa: $10,668; Washington: $10,202; Oregon: $9,945.

Fourth quintile: Missouri: $9,875; South Carolina: $9,732; Arkansas: $9,616; California: $9,595; Indiana: $9,548; Georgia: $9,202; Alabama: $9,028.

Fifth quintile: South Dakota: $8,881; Florida: $8,755; Texas: $8,593; North Carolina: $8,512; Nevada: $8,414; Mississippi: $8,263; Arizona: $7,528; Idaho: $6,621.

Source: United States Census Bureau, *Public School System Finances* (2014), https://www.census.gov/govs/school/, State Level Tables, Tab 8 (accessed 10/21/2016).

CHART B: RANK ORDER OF JURISDICTIONS BY IDEA FILINGS PER 10,000 STUDENTS, HIGHEST TO LOWEST	Just More than Trivial Benefit	Meaningful Benefit
First Quintile	New York (3) (2nd Cir); Connecticut (9) (2nd Cir).	Virgin Islands (4) (3rd Cir.); New Jersey (7) (3rd Cir).
Second Quintile	Vermont (13) (2nd Cir).	Pennsylvania (11) (3rd Cir.); Delaware (20) (3rd Cir).
Third Quintile	New Mexico (23) (10th Cir.).	Ohio (24) (6th Cir.); Tennessee (27) (6th Cir.).
Fourth Quintile	Kansas (37) (10th Cir.).	Michigan (36) (6th Cir.).
Fifth Quintile	Oklahoma (42) (10th Cir.); Colorado (43) (10th Cir.); Wyoming (47) (10th Cir.); Utah (51) (10th Cir.).	Kentucky (46) (6th Cir.).

First Quintile: District of Columbia (1); Puerto Rico (2); Hawaii (5); California (6); Massachusetts (8); Maryland (10).

Second Quintile: Virginia (12); Alabama (14); Nevada (15); Rhode Island (16); Maine (17); Illinois (18); Washington (19).

Third Quintile: Alaska (21); Texas (22); Missouri (25); Georgia (26); Arizona (28); Florida (29); Virginia (30).

Fourth Quintile: Indiana (31); Mississippi (32)(tie); Idaho (32) (tie); Oregon (34); West Virginia (35); Montana (38); North Carolina (39); Arkansas (40).

Fifth Quintile: Louisiana (41); Minnesota (44); Wisconsin (45); Iowa (48); South Dakota (49); South Carolina (50); Nebraska (52); North Dakota (53).

Source: Perry Zirkel, *Trends in Impartial Hearings Under the IDEA: A Follow-up Analysis,* West's Education Law Reporter, 303, (2014) 1 at 18 App. 3, https://perryzirkel.com/publications/#due (accessed 11/4/2016).